University of Saskatchewan

JUDGMENT OF VISITOR

ON THE

COMPLAINT OF CERTAIN PROFESSORS

AND THE

DIRECTOR OF EXTENSION WORK

DELIVERED APRIL 30
1920

SASKATOON
1920

In the King's Bench

IN THE MATTER OF "THE UNIVERSITY ACT" AND IN THE MATTER OF THE UNIVERSITY OF SASKATCHEWAN AND THE DISMISSALS OF ROBERT DAWSON McLAURIN, PROFESSOR OF CHEMISTRY, JOHN L. HOGG, PROFESSOR OF PHYSICS, IRA A. MACKAY, PROFESSOR OF LAW AND LECTURER ON POLITICAL SCIENCE, AND SAMUEL E. GREENWAY, DIRECTOR OF AGRICULTURAL EXTENSION EDUCATION, FROM THEIR RESPECTIVE OFFICES AND POSITIONS THEREIN.

HUGH PHILLIPS, K.C. *and* BEATON H. SQUIRES *for the Professors.*
P. E. MACKENZIE, K.C., *and* D. MACLEAN, K.C., *for the Governors.*

JUDGMENT OF THE VISITORS

Professors MacLaurin, Hogg and MacKay, and Mr. Greenway, director of extension work, were dismissed by the Board of Governors of the University of Saskatchewan. From this dismissal they appealed to the Lieutenant-Governor as Visitor. By virtue of Sec. 2 of Chap. 16 of the acts of 1919-20, these visitorial powers are to be exercised by this court.

The University Act, Chap. 98, R.S.S. 1909, provides that the University shall consist of a chancellor, convocation, senate, board of governors and council.

By section 60 the management, administration and control of the property revenues, business and affairs of the University are vested in the Board of Governors.

Governor's Powers

By section 61 the Board of Governors is given power to appoint the professors, teachers, etc., as it deems necessary, fix their salaries or remuneration and define their duties and terms of office or employment, which unless otherwise provided shall be during the pleasure of the board, provided that no member of the teaching staff of the university or of any

faculty thereof shall be promoted or removed from office except upon recommendation of the President.

Under this Act it cannot be contended that the professors are appointed for life, subject to removal only for expressed impropriety of conduct, because the act expressly provides that unless it is otherwise provided their appointment is during pleasure only.

The professors under the Act are members of the council. Mr. Weir, in Weir v. Mathieson, 3 U.C.E. and A 123, was a member of the senate, and in that case Hagarty, J., in delivering the judgment of the court, said at p. 159:

> "Mr. Weir could be 'amoved' from the office of professor, although he could not, without cause, be 'disfranchised' as a member of the corporation, according to Chancellor Kent's definitions (Dartmouth College case, 4 Wheaton, 534). His dismissal from his situation still leaves him a member of the corporate body."

During Pleasure

Where the appointment is during pleasure no notice is required, nor need any hearing be given, because as was said in an old case, King vs. Stratford, 83. E.R. 413

> "for it is to no purpose to summon him to answer whom they may remove without a crime."

In a similar case, *ex parte* Jacob, 10 N.B. 153, where a professor appointed "during pleasure" was removed, Carter C. J. at p. 162 said:

> "Under this, we think that the right of removal by the Senate, of any of the professors, as well as the other officers and servants of the University, who are all placed in the same category in the manner provided for, is absolute, at the pleasure of the College authorities: *i.e.* the Senate and the Governor in Council. By the original charter of King's College, the Professors were appointed by the Crown *during pleasure*; and by the Act for establishing the University of New Brunswick, the offices of the Professors and other officers in the University, are not held for any fixed time, nor by any permanent tenure; but, by the Act of the Legislature to which the Crown is a party, they are held at the pleasure of the governing bodies of the University, *i.e.* the Senate in the first place, subject to the approval of the Crown, as represented by the Governor in Council; and when that approval is given, the Act of the Senate becomes conclusive and final. By this power, subject to the sole restraint of the Governor in Council, the Senate may, if they see fit, remove any of the officers, without any formal proceeding in the nature of a trial, in the same way that a private individual may dispense with the services of a clerk or other servant, and are not liable to be called to account for their proceedings in any other tribunal.

"It is said in *Angel and Ames on Corporations*, as to the form required in amoving a ministerial officer elected during the pleasure, very little formality is requisite. Such an officer is not entitled to any notice."

Little Formality Required

In Regina v. Governors of Darlington School, 6 Q.B. 681, Tindal, C. J., in delivering the judgment of the court, at p. 714, said:

"The plaintiff in error contends that, upon the proper construction of the letters patent of Elizabeth, the schoolmaster is appointed during good behavior at least, so that he had in contemplation of law a freehold in his office, and that, upon the authority of *Bagg's Case*, 11 Rep. 93 b, *Dr. Gaskin's Case*, 8 T.R. 209, and others cited, the plaintiff could not be legally amoved without being summoned to answer the charge, nor, without having a reasonable time to answer, nor, lastly, without proof of the charges brought against him: all which steps are found by the jury not to have existed in this case.

"And, if this is the true construction of the charter of foundation, if the office of the schoolmaster resembled that of a freeman of a borough, which was Bagg's Case, who according to the report of Lord Coke, 11 Rep. 98 b, had 'a freehold in his freedom for his life, and with others, in their politic capacity,' 'an inheritance in the lands of the said corporation,' or if the office of schoolmaster resembled that of a parish clerk which was the subject of discussion in *Dr. Gaskin's Case*, the inference drawn from those cases might be correct. But, looking to the terms of the letters patent of Queen Elizabeth, we think the office in question is, in its original creation, determinable at the sound discretion of the governors whenever such discretion is expressed, and that it is in all its legal qualities and consequences not a freehold but an office *ad Libitum* only. The Governors would be guilty of misconduct, might perhaps render themselves liable to a criminal prosecution, if they exercised their discretion of removal in an oppressive manner, or from any corrupt or indirect motive: but we see nothing that is to restrain them from exercising such discretionary power whenever they honestly think it proper so to do. The letters patent, after incorporating the Governors, expressly give them the power of nominating from time to time, a master of the said school, 'so often as to them and their successors, or the major part of them, occasion them moving thereto, should appear, *and of removing the same master, etc., from the said school, according to their sound discretion, and of placing or appointing other or others more fit in their stead or steads.*' The founder had an undoubted right to repose this large confidence in the governors, if she thought proper: and she appears to have intended so to do without subjecting the exercise of this discretion either to the judgment of any visitor or of any jury; and, if the master was appointed *ad Libitum*, as we think he was, it is clear he was removable without any summons or hearing of him; *Rex* v. *Mayor of Stratford-on-Avon*, 1 Lev. 291. And there seems nothing unreasonable in the founder's giving such authority to the Governors. For there may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of charge before a jury, or otherwise of actual proof. A general want of reputation in the neighborhood, the very suspicion that he has been guilty

No Restraint to Discretionary Powers

Founder's Rights

of the offences stated against him in the return, the common belief of the truth of such charges amongst the neighbors, might ruin the well-being of the school if the master was continued in it, although the charge itself might be untrue, and at all events the proof of the facts themselves insufficient before a jury. Many other grounds of amoval fully sufficient in the exercise of a sound discretion might be suggested."

In Weir v. Mathieson, Hagarty, J., reviews all the cases in which the courts interfered in the removal of a professor or school teacher, and found the effect of them to be, that, unless the professor was in the position of a *cestui que* trust having an interest in a particular fund or a freehold interest in property, the courts would not interfere. If the professor is paid out of the general funds of the university, his only remedy is to appeal to the visitor, unless he has an action for damages for breach of contract.

Powers of Visitor

What then are the powers of a visitor? In the Burdock case, 7 Pick. 303, Parker C. J., upon this point says, at p. 327:

"The appeal entirely vacated the sentence of the trustees and brought the case before the visitors, whose duty it was to hear the whole case anew, without prejudice from the previous proceedings."

In Regina v. Dean, etc., of Rochester, 17 Q.B. 1 at p. 32, Erle J., says:

"As to the first question: it is clear that, under statute 38, the Dean and Chapter have an original jurisdiction to remove an officer of this kind for a grave offence. It is also clear that, under statute 38, the visitor has power to say whether such removal has been wrong. He is to do all that pertains to the office of visitor; he may himself expel if the Dean and Chapter ought to have expelled but have not; and it follows that he is the person to adjudicate as visitor when the Master has been removed and alleges that the removal is wrongful."

Visitor as Inspector

The above quotations give the power of a visitor generally; but in re Wilson, 18 N.S. 180 Thompson J., afterwards Sir John Thompson, minister of justice and premier of Canada, at p. 197, says:

"No appeal is to be implied from the mere creation of the office of Visitor, because the appeal which the common law recognises to the Visitor is an appeal from corporations, corporators and officers situated in a position directly opposite to that which the Governors occupy. The visitor is the inspector over those who are governed—this appeal would make him ruler over those who are appointed to govern. The Visitor is declared, in the English cases, to have power to remove a corporator, *e.g.* a Fellow. Could it be contended that he has power here to remove a Governor? The jurisdiction which the common law

> recognizes as possessed by the Visitor, the Courts defer to, because it is a private jurisdiction, created by the Founder, who had a right to do as he pleased with his lands and goods, and, therefore, has a right to make them subject to a private jurisdiction. The lands and goods which these governors administer they administer for a public trust, and that makes it still more difficult to imply an appeal to a private jurisdiction. The office of Visitor may be a very useful and important office without an appeal from the Governors being attached to it, and, therefore, the appeal from them is not necessarily to be implied from the creation of the office."

King's College was incorporated by an act of the legislature of Nova Scotia in the same manner as the University of Saskatchewan was incorporated by the legislature of Saskatchewan, and in both cases an annual charge on the revenues of the province was made in favour of the college, and therefore the law as laid down by the supreme court of Nova Scotia would apply to this case.

No Power to Interfere

In this case, the professors having been appointed "during pleasure," are removable by the board of governors on the recommendation of the president. All that it is necessary then for us to consider is, whether the provisions of the statute were complied with, and we find that at a regularly called meeting of the governors—of which all the members had proper notice, excepting the president, who was absent on leave of absence, and at which all the other members were present excepting Mr. Hitchcock, who subsequently approved of the action of the meeting, the three professors and Mr. Greenway, on the recommendation of the president, were dismissed on three months' notice, or rather, three months' salary in two cases and six months' in the other two which is of the same effect as previous notice. The statute and bylaws having therefore been complied with, we have in our opinion, no power to interfere with what has been done, unless the president or the governors exercised their discretion of removal in an oppressive manner or from a corrupt or indirect motive.

Lord Denman, C. J., says in Regina v. Governors of Darlington school *supra*, at p. 696:

> "The prosecutor has denied the charges and the trial; but he does not deny the exercise of discretion, which might have been disproved in fact, as by showing that malicious feelings against the master were indulged by the Governors, or that they had some interest to serve in promoting another to his place."

And Tindal, C. J., in the same case, says, at p. 714:

> "The governors would be guilty of misconduct, might perhaps render themselves liable to a criminal prosecution, if they exercised their discretion of removal in an oppressive manner, or from any corrupt or indirect motive: but we see nothing that is to restrain them from exercising such discretionary power whenever they honestly think it proper so to do."

Causes for Removal

Before inquiring into these motives, let us first inquire, for what causes men occupying the office of professors in a university, their appointment being during pleasure, may be dismissed from office.

In Gibson v. Ross, 7 Cl. and F.241, Lord Cottenham, L. C., at p. 254, said:

> "Now, there are many cases in which it would be highly inexpedient for the interest of a body like these trustees that a man should continue in his situation, though it might be difficult to show a legal ground for his removal. He may be unsuccessful in the discharge of his duties; he may have great abilities, but yet be unable effectually to exert them in the instruction of his pupils. This might be a great evil to an institution of this nature, and yet it might not amount to a cause which in a Court of Justice would justify the dismissal of the master. At the same time, it must be admitted that the circumstance which I have mentioned would form a good ground for desiring the master's dismissal."

And Hagarty, J., commenting on the above in Weir v. Mathieson, *supra* at p. 162, says:

> "It is needless to enlarge this list of actual, though not, perhaps, legal disqualifications. An unstained moral character, high intellectual attainments, and unsparing activity in the discharge of duty, may, and often do, co-exist with unhappy forms of temper, restless irritation and morbid sensitiveness, or jealousy, which may utterly unfit their possessor for the useful discharge of the delicate duties of education, and the creation of respect and confidence amongst fellow-workers and pupils."

And Tindal, C. J., in the Darlington case, at p. 715, says:

> "For there may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of charge before a jury, or otherwise of actual proof. A general want of reputation in the neighborhood, the very suspicion that he has been guilty of the offences stated against him in the return, the common belief of the truth of such charges amongst the neighbors, might ruin the well-being of the school if the master was continued in it, although the charge itself might be untrue, and at all events the proof of the facts themselves insufficient before a jury. Many other grounds of amoval fully sufficient in the exercise of a sound discretion might be suggested."

We will next consider the reasons, as shown by the evidence, why the petitioners were removed from office. Reasons for Removal

The trouble commenced with Mr. Greenway making a charge against President Murray to Mr. Dunning, minister of agriculture, of manipulation of funds based on information which had been in Greenway's possession for a very long period, without his taking any action on it. At the same time he charged that only a small number of the faculty were satisfied with the president's administrative methods. Mr. Greenway may not have charged that the majority of the faculty were disloyal, but he did charge a want of confidence in President Murray's administrative methods, and in the result the meaning is the same. The evidence shows that each and every one of these charges was untrue and had no foundation in fact, and Mr. Greenway subsequently withdrew them in writing before the Board of Governors. Previous to this, the minister had requested President Murray, and Mr. Rutherford, dean of the faculty of agriculture, to see him in Regina, when he told them what Mr. Greenway had said. He subsequently confirmed this by letter. The president laid the matter before the Board of Governors of the university, and placed his resignation in their hands in case the charges should be proved correct. He also laid the matter before the university council, and it was discussed at a meeting of the council held on the 7th of April, 1919, and, later, a resolution was passed at a full meeting of the council on the 9th April, affirming confidence in the president and in his administration, and asserting the loyalty of the members of the faculty. The three professors in question, and Professor Adams, did not vote on the resolution, but subsequently filed reasons for not doing so, as follows:

1. They do not wish to join in any motion which might prejudice or reflect in any way upon Mr. Greenway until he returns from the Pacific Coast and may speak and be heard for himself on all charges made against him. Minority "Minute"

2. This council is not the proper body before whom to make these serious charges against Mr. Greenway. The charges alleged to have been made by Mr. Greenway were made to a Minister of the Crown and should be dealt with by

the minister or by a proper court of inquiry where all parties may be heard.

3. The statement alleged to have been made by Mr. Greenway that "with the exception of two or three the faculty was disloyal to the president" cannot be either proven or disproven by the formal vote of the council.

Failure to Vote Confidence

It is difficult to understand why a man who is loyal to the president of his own institution should fail him at a time of need, or hesitate to vote loyalty to his chief if the loyalty exists. It is to be remembered in this connection that all three of the professors had seen the memorandum which Greenway showed to the minister, which purported to show that Greenway's charges were justified. The written reasons signed by the three professors amount to an assertion that the charges of Greenway were such as should be investigated, and, indeed, the position which these professors took on this question is but little different from that of Greenway himself. When a man undertakes to make charges reflecting seriously on the character of the head of a great public corporation of which he is himself a member, charges which, if proved, show wrong doing on the part of the president almost of a criminal nature, he takes his professional life, as far as that institution is concerned, in his hands. We consider that the failure to vote confidence in the president's management of the university and loyalty to the president in the light of the written reasons which were filed, constitute such an open alignment of these professors behind Greenway in the charges he made, that it became essential that their services with the university should be dispensed with in case the charges were not substantiated. The assertion that the charges should be investigated by a minister of the crown or a proper court of inquiry, amounts to nothing less than a direct alignment of themselves on Greenway's side in a dispute with the head of the university, involving a question as to the president's character, which, if proved, meant that he was to be dismissed and disgraced. It was a position not to be taken lightly and without first considering the consequences, and it is to be presumed that these three gentlemen considered the matter carefully from all angles before taking the course they did.

When given a further opportunity of expressing their sentiments in this regard by the Board, who requested them to submit a statement in writing indicating clearly whether they were satisfied or not with the administration and management of the university and, if dissatisfied, their reasons for being so, with exception of Professor MacLaurin, whose answer is evasive, they did not reply, and when pressed to do so, they answered in an equivocal manner and did not meet the point at issue. Again when the Board asked for their attendance before them to discuss this matter it was only with difficulty—after numerous requests—that Professor Hogg, the only one of the three who complied with the request, attended, and he declined to discuss this question with them, but promised to write them, which he did, but in the letter failed to meet the issue. Neither Professors MacLaurin or MacKay ever attended the Board, giving as their reasons for not doing so that they had discussed the matter with Dr. Murray and they thought the same was settled. This was no excuse for not complying with the request of the Board and their actions in this matter shows a spirit of contumacy to the Board and a disrespect for their authority. Evasive Replies

Many matters have been given in evidence herein concerning which it is neither necessary nor desirable that we should make any specific finding, other than that they constitute additional reasons for the dismissal. We have had evidence regarding straw gas and lignite projects, regarding sabbatical years, regarding neglect to give lectures, regarding differences in the council over the Normal School site, increases of salary, and evidence almost in the nature of gossip regarding conversations and many other minor matters not necessary to be enumerated. Concerning this evidence, while we are of opinion that the numerous circumstances therein brought out may have each played its part in causing the situation which had arisen, nevertheless, it is not necessary in coming to a proper decision herein, nor is it in the best interests of the University or of the professors, that we should deal with these matters in detail—matters which would not influence or change the result, no matter which way they might be decided. Additional Reasons

Previous to the formal dismissal, the Board, on becoming Overtures Misunderstood

convinced that it was necessary that the professors should leave the University, had attempted to have them go without being actually dismissed and without unnecessary publicity, and with a generous allowance both as to leave and to salary. The action of the Board at this time was conceived in goodwill and would have enabled these gentlemen to leave the service of the University without damage to their reputations and without injury to the institution. The Board had arranged to permit them to resign, and to have a long leave of absence with pay, but the spirit in which these overtures were made was not understood, as we think, unfortunately for all parties concerned.

A Necessary Course

The facts disclosed in this exhaustive inquiry of twelve days, prove that the course taken by the President and the Board was necessary. A state of affairs in the University had been created such as made it impossible that these men should remain any longer in the service of the University. There is no room for doubt on this point, and, indeed, the professors themselves have given public recognition to this fact, for at the close of the hearing they filed their resignations, to take effect in case the court should decide to reinstate them in their positions.

Merits of Individuals

At this stage we wish to refer to the words of Hagarty, C. J., in Weir v. Mathieson *supra* at p. 162:

> "The Court anxiously avoided all intermeddling with the merits or demerits of individuals in the unfortunate disputes that have resulted in this litigation.
>
> "It is sufficient to say that, wherever the blame rested, a state of things was disclosed most injurious to the best interests of Queen's College.
>
> We are anxious to carry out the benevolent directions of the last section of the royal charter, which enjoins on courts of justice that its language 'shall be construed and adjudged in the most favorable and beneficient sense for the best advantage of our said college.'"

Acting on the same principle, we are of opinion that the recommendation of President Murray and the proceedings of the Board of Governors in dismissing Professors MacLaurin, Hogg and MacKay and Mr. Greenway, were regular and proper and necessary in the best interests of the university, and that neither the President nor the Board of Governors

acted oppressively in the matter, nor is there the remotest suggestion of any corrupt or indirect motive, and that their decision should therefore be confirmed.

(*Sgd.*) H. W. NEWLANDS, J. A.
J. F. L. EMBURY, J.
GEORGE E. TAYLOR, J.

Regina, April 30, 1920.

The marginal headings were not in the Judgment